Archd Hamilton
of
Eupham Hamilton

July 24th, 1758.

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INFORMATION

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FOR

ARCHIBALD HAMILTON of *Roſehall*;

AGAINST

38.

Mrs. *Eupham Hamilton*, Executrix of Miſs *Marion Hamilton* deceaſed, and the Husband of the ſaid Mrs. *Eupham*, for his Intereſt.

UPON the Death of Sir *Hugh Hamilton*, late of *Roſehall*, a Competition aroſe about the Succeſſion to his Eſtate, betwixt the Informant and Miſs *Marion Hamilton*, the Daughter and only Child of the ſaid Sir *Hugh*, which was in Dependance when Miſs *Hamilton* died, in her Infancy, and in the State of Apparency.

Upon Miſs *Hamilton*'s Death, the Succeſſion of the Eſtate of *Roſehall* devolved indiſputably upon the Informant. Upon his Acceſſion and Service as Heir of Tailzie, he obtained a Decreet in his Baron Court againſt the Tenants, for the Rents remaining in their Hands unuplifted by Miſs *Hamilton* or her Tutors, during her Apparency.

The ſaid Mrs. *Eupham Hamilton* likewiſe claimed theſe Rents, as Executrix confirmed to Miſs *Hamilton*, alledging that the Rents which fell due, during Miſs *Hamilton*'s Life, were *in bonis* of Miſs *Hamilton*, though unuplifted from the Tenants, and were transferred to her by her Confirmation.

Upon this double Diſtreſs, the Tenants raiſed a Multiplepoinding, in which the competing Parties appeared before the Lord Juſtice Clerk, as Ordinary, and pleaded their reſpective Grounds of Preference, which Debate the Lord Ordinary was pleaſed to take to report, and to ordain Informations to be given in.

This Competition depends upon a Queſtion in Law, Whether an Heir, dying in the State of Apparency, has a full and ample Right to the Mails and Duties of his Predeceſſor's Eſtate, though unuplifted from the Tenants, ſo as to tranſmit that Right to his Executors? Or, if the Rents unuplifted remain *in hereditate* of the Predeceſſor laſt infeft, and are tranſmitted therewith, to the Heir next ſerved and retoured? That the laſt of theſe Propoſitions is moſt agreeable to the Principles of Law, and the Deciſions of the Court, this Informant ſhall in the Sequel endeavour to ſhew.

By the Law of *Scotland*, derived from the Feudal Law, all Land Property is underſtood to be held of a Superior, either of the Crown, the paramount Superior, or of a Subject, deriving Right from the Crown: The Superior, by virtue of the ſuper-eminent Title, retains the *dominium directum* of the Lands, and the Vaſſal acquires the *dominium utile*.

It is a Principle, that no Vaſſal can have a right or legal Title to Lands, except by virtue of a Charter or Diſpoſition from the Superior, containing a Precept of Seaſine, and a Seaſine or Inſtrument of Poſſeſſion following upon it. Theſe Title-deeds are eſſentially neceſſary to the Conſtitution of Feudal Property: Hence the *Maxim*, *nulla ſaſina, nulla terra*. Without a Charter and Seaſine from the Superior, no Right to Lands can be eſtabliſhed in a Vaſſal, by the Law of *Scotland*.

As the Superior's Precept, for infefting the Vaſſal, is conceived perſonally to the Vaſſal himſelf, ſo when it is executed by the Vaſſal's taking Infeftment upon it, it is exhauſted in the Vaſſal's Perſon, and the Effects of it cannot be tranſmitted by

by the Vaſſal, either to ſingular Succeſſors, or to Heirs. If a Vaſſal conveys his Lands to a ſingular Succeſſor, that Conveyance cannot be reckoned compleat, as it was in the Vaſſal's Perſon, till the ſingular Succeſſor applies to the Superior, and obtain a new Charter and Precept for infefting himſelf.

In like Manner, upon the Death of the Vaſſal infeft, even where the original Charter is conceived to the Vaſſal and his Heirs, the Right to the Lands is not immediately veſted in the Heir, by the Law of *Scotland*, *mortuus non ſaſit vivum*: on the contrary, the Lands are held to return to the Superior, ſubject indeed to be taken up by the Heir, upon the Grant to Heirs in the original Charter: But this Right is not veſted in the Heir, *ipſo jure*: Certain Forms are neceſſary to conſtitute it: He muſt apply to the Superior, and upon Proof brought, that he is Heir of the Inveſtiture, obtain from him a Renovation of the Feu, and a Precept for Infeftment; and when Infeftment is taken upon this Precept, then, and not till then, is the feudal Right to the Lands, veſted in the Heir.

Upon this Principle of the Feus returning to the Superior, by the Death of the Vaſſal, depends the eſtabliſhed, and univerſally prevailing Caſualty of Superiority, called Non-entry, whereby the Superior is entitled, upon the Death of his Vaſſal, to purſue Declarator, and obtain the full Poſſeſſion of the Rents of the Feu, till ſuch Time as the Heir ſhall obtain from him a Renovation of the Feu, by virtue of which Renovation alone, the Heir can obtain a Right to the Lands.

From theſe Principles, it clearly follows, that as an apparent Heir has no legal Right or Title to the Lands themſelves, neither has he any Right to the Rents of them, during his Apparency: Theſe Rents belong to the Superior, if he chooſes to claim them, and if he does not, they remain a Part of the Inheritance, to be taken up by the next Heir, who ſhall make up proper Titles to the Vaſſal laſt infeft, and therefore, if an Heir dies in the State of Apparency and unentired, it

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is contradictory to the Rules of Law, to ſuppoſe he can tranſmit to his Executors, a Right to the Rents falling due, during his Apparency, which did not belong to himſelf.

That the Rents of Lands, ariſing after the Death of the Vaſſal, are underſtood to be Part of his Inheritance, and to be tranſmitted with the Lands themſelves, is aſcertained by the regular and conſtant Effects, which are given to Adjudications led againſt the deceaſt Vaſſal's Eſtate, whether they are Adjudications *cognitionis cauſa*, or upon a Charge to enter Heir. By the firſt Kind, the *hereditas jacens* of the Defunct is adjudged to the Creditor; and in that *hereditas jacens*, the Rents of the Lands, fallen due after the Vaſſal's Death, are always underſtood to be comprehended and to be carried by the Adjudication. By the other Kind, a Charge to enter Heir being held to be equiparate to a Service, that Service, by taking up the *hereditas jacens* of the Predeceſſor is underſtood likewiſe to take up the Rents, that have ariſen after his Death. Theſe Things are altogether inconſiſtent with the Notion, that theſe Rents belonged of Right to the apparent Heir; for if the Right was once in him, how is it poſſible he can be diveſted of it, ſo as to re-inſtate it in the Defunct, to paſs as Part of his Inheritance? No Fiction of the Law could be ſo abſurd.

At the ſame time, as the apparent Heir has undeniably an intimate Connection with, and a kindly Right to the Inheritance of the Anceſtor, which he could render effectual at any time by Service and Infeftment, it would appear, that the Law, or rather the Deciſions of the Judges, had given him certain Privileges, whereby to enable him to defend the Lands from being carried off by every Pretender, and to preſerve the Rents from periſhing in the Hands of the Tenants. Thus the Deciſions have, Step by Step, given the apparent Heir a Privilege to continue the Poſſeſſion of the Manſion-houſe of his Predeceſſor; to defend the Tenants of the Eſtate againſt an Intruder; and, leſt the Rents ſhould periſh in the Hands of

of the Tenants, he may even uplift them from the Tenants, if they are willing to pay him; and, as the natural Conſequence of this Allowance, the Tenants are deemed to pay ſafely to the apparent Heir. But great Care ſhould be taken, not to convert into a Right a Privilege, that was introduced only for Utility and Conveniency. The Informant ſhall not, at preſent, ſtop to enquire into the Juſtice of theſe Privileges, that have, in particular Caſes, been given to an apparent Heir, of continuing his Predeceſſor's Poſſeſſion, of allowing the Tenants to pay ſafely to him, and of ſubjecting the Rents in Payment of his Aliment, or other neceſſary Demands, though he muſt be allowed to ſay, they have been, all and each of them, introduced *præter juris regulas*, as nothing can appear more anomolous, than, that a Perſon, who has no Right to the Lands, ſhould without deriving Right from any Proprietor, be intitled to the Rents and Profits of theſe Lands. But he hopes theſe Privileges will not be extended further than they have been. There is not a more dangerous Thing in the Law, than the deviating from eſtabliſhed Rules and Principles, the natural Conſequences of which muſt be Confuſion and Uncertainty. One Deviation begets another, till at laſt the Rules and Principles are forgot, and the Multiplicity of Exceptions renders Deciſions arbitrary and precarious.

However far therefore Privileges of apparent Heirs have been ſuſtained, ſtill they ought not to be converted into a Right, which the Principles of Law cannot admit of, that of a full and abſolute Property in the Rents of the Lands, ariſing during his Apparency, though unuplifted by him, ſo as to tranſmit them to his Executors. Without ſuch a full Right was veſted in him by the Law, it is impoſſible they can be transferred to his Repreſentatives. But ſuch a Right has not yet, by any Deciſion, been veſted in an apparent Heir.

Our Anceſtors gave even the Privileges beforementioned to apparent Heirs, with Reluctance and Heſitation. In the

Caſe, *Oliphant contra* his Tenants, 19th *February*, 1633, the Lords at firſt refuſed to allow the apparent Heir to uplift the Rents in the Tenants Hands. And they would not have altered this Interlocutor, but from the Conſideration, that the Rents might periſh; but ſtill they obliged the Heir to find Caution, to warrant the Tenants at all hands. This ſhows of how little Avail the apparent Heir's Right to the Rents was held in theſe Days.

Two Deciſions in After-times, one in the 1662, Lady *Tarſappy*, the other, in the 1683, *Macbrair* of *Netherwood*, have furniſhed Lawyers with a Pretence to argue for the Extenſion of the apparent Heir's Right to the Rents of Lands even unuplifted by him. But as theſe Caſes were attended with particular Circumſtances, and were contradicted by other Judgments about the ſame Period, the whole of them ſhall be ſtated, as they ſtand in the Books, whence it will appear, that the Principles of Law ſtill prevailed, which deny any Right to the apparent Heir, further than his Poſſeſſion has gone by uplifting the Rents.

The Caſe of Lady *Tarſappy* was extremely favourable: She had alimented her Son, the Heir apparent, after her Huſband's Death; the Son died in Apparency, without having uplifted the Rents, and applied them for the Payment of his Aliment. The Lady purſued the next Heir, to pay her that favourable alimentary Debt, which was a natural Burden upon the Rents, falling due, during the apparent Heir's Life, which the ſucceeding Heir had intromitted with. The Lords, in this circumſtantiate Caſe, found the Heir liable for the apparent Heir's Aliment. This Caſe was ſo ſtrongly founded in Equity, that it is no Wonder that the Court made a long Arm to reimburſe the poor Mother out of the Rents, which ſhe might have uplifted, during her Son's Apparency, and applied to his Aliment. But, let that Deciſion have what Weight it may, it ſtill will not prove that the aprarent Heir had ſuch a compleat Right to the Rents, as to tranſmit them to his Repreſentatives.

preſentatives. The Aliment of the Heir is one of the moſt natural, as well as neceſſary Privileges, that can ariſe from his Apparency. But that ought not to be extended to give him a *plenum dominium*, or full Right to the Rents unuplifted and unſpent.

The other Caſe of *Macbriar*, in the 1683, is very fully collected by Lord *Harcus*, and ſhall be given in his own Words, *V. Airs*, p. 10. " In the Reduction of an Act, wherein the " Lords found (*July* 7th, 1681, *Macbriar, c.*) " that unuplifted Mails and Duties were *in bonis* of the appa- " rent Heir, and might be confirmed in his Teſtament. Upon " a Review they were very clear to alter the Interlocutor, and " to find, *that all unuplifted Mails and Duties were* in hereditate " jacente, *and belonged to the Heir ſerved to the Perſon dying laſt* " *veſt and ſeaſed in the Lands.* But the new Debate proceeding " *ſuper iiſdem deductis*, they were loth to reſcind expreſly that " Interlocutor, and contented themſelves to explain and clog " it thus, that in the Competition of Debts due by the De- " funct laſt infeft, and the Debts of the apparent Air, the " Mails and Duties ſhall be liable, *primo loco*, to ſatisfy the for- " mer; which Explanation ſerved the Purſuer's Turn for ex- " tinguiſhing an Appriſing, led upon Debts by the Defunct " laſt infeft." If this accurate and judicious Collector is to be credited, the Informant has no Reaſon to be afraid of this Deciſion. The firſt Interlocutor, finding the unuplifted Mails and Duties to be *in bonis* of the apparent Heir, appears to have been pronounced haſtily upon an Act; and that, upon a Review, the Lords were very clear to alter it, and to find, that all unuplifted Mails and Duties were *in hereditate jacente*. This is an expreſs Judgment of the Bench in favour of what is now pleaded.

Upon the ſame Principles, the Court afterwards decided in two Caſes, likewiſe obſerved by Lord *Harcus*. The firſt is, *January* 1683, *Ballantine* contra *James Bonnar*'s Relict, where he ſays, p. 12. " It was expreſly found, that unuplifted Mails " and

" and Duties did not fall under an apparent Heir's Executry,
" but were *in hereditate jacente*, and belonged to the Perſon
" ſerved Heir to the Defunct, laſt veſt and ſeaſed."

And again, *February* 1688, *Balgone* contra *James Hay*, p. 13,
" It was found, that the Executors or Aſſignees of apparent
" Heirs dying unentered, had no Right to Mails and Duties
" of Lands, or to Annualrent of heritable Bonds, reſting un-
" uplifted the Time of the apparent Heir's Deceaſe, though
" Payment made to apparent Heirs would exoner Tenants.
" And it was not material here to conſider, if the apparent
" Heir's Executors would be liable to reſtore what was uncon-
" ſumed of that which he uplifted."

Theſe Deciſions prove, beyond Poſſibility of Doubt, that the firm Opinion, not only of this learned Judge, but of the whole Court, was, at that Period, that as the apparent Heir had himſelf no Right to Rents unuplifted, no Right in them could be tranſmitted to his Executors.

After theſe repeated Judgments, the Point does not ſeem to have been doubted of, or to have received a Judgment till now, that it is again ſtirred by this Executrix. And indeed ſo much was it held to be Law, that the learned Authors of the two late Inſtitutes of our Law, have both given their Opinion poſitively in favour of the Informant. The Honourable Author of the larger Inſtitute, lays it down, Vol. II. p. 324, " That an apparent Heir may continue his Anceſtor's
" Poſſeſſion, and he may uplift the Rents and enjoy the ſame,
" and during his Life they are affectable for his Debts. Upon
" his Death, ſuch as then were due may ſeem to fall to his
" Executors; but the Caſe is otherwiſe; for though an ap-
" parent Heir may receive and enjoy the Rents, voluntarily
" paid by the Tenants, and ſo is allowed to poſſeſs, becauſe
" he has it in his Power to make up a competent Title to the
" ſame, and to the Eſtate itſelf, by a Service; yet, he dying
" in his Apparency, the Rents unuplifted follow the Right
" of the Eſtate, and fall to the next Heir; ſo that the de-
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" ceaſed's Executor can no more claim the bygone Rents,
" than his Heir can the Eſtate."

Erſkine, in his Principles of the Law, treating of this Subject, ſays, P. 222. " But in Truth, though Apparency be a
" Title of Poſſeſſion, the Rents which the Heir did not really
" uplift, and to which he had made up no Right by Entry
" before his Death, muſt, from the Neceſſity of the Law,
" be *in hereditate jacente* of the Perſon laſt infeft."

Such having been the Courſe of Deciſions from the 1682, and ſuch being the eſtabliſhed Opinion of the Authors of the preſent Times, and theſe Deciſions and Opinions ſtanding upon the firm Baſis of the Feudal Law, it is hoped your Lordſhips will not now give way to an Innovation and Alteration of the Law, upon whatever ſpecious Arguments it may be attempted.

It is believed, our Party would not ventured to have diſputed this Point, had it not been for ſome Paſſages in *Stair*'s Inſtitutions, which ſeem to favour her Argument. It muſt be owned, that this Author has not treated this Subject with that Accuracy and Preciſion, for which, in general, he is ſo juſtly admired. His Opinion is wavering, and his Poſitions are unſupported by Authorities or juſt Reaſoning, which can only be imputed to that Convulſion which had been unwarily made in the Law by the before mentioned Deciſions of Lady *Tarſappie* and *Macbriar*, which had been pronounced by the Court, juſt before the Author went abroad and compiled his Inſtitutes, where he had not an Opportunity of being informed, that the Law had been reſtored to its original Footing by the ſubſequent Deciſions obſerved by Lord *Harcus*.

Lord *Stair*'s Words ſhall be collected from the different Paſſages, and ſubmitted to your Lordſhips.

He ſays, P. 199, " But every Heir muſt be infeft in Fees,
" otherwiſe, if they die uninfeft, they never attain the real
" Right, but only a poſſeſſory Title to the Fruits and Rents,
" from the Predeceſſor's Death till their own Death, which will

" belong to their Executors, in ſo far as unuplifted from the " Predeceſſor's Death, till their own Death or Renunciation " to be Heir, and will be affected for their proper Debts, " which will not affect the Heritage, or the next Heir enter- " ing, who muſt enter to the Defunct who died laſt infeft, " and will be liable for his Debts, but not for the Debts of " his apparent Heir, who was never infeft; except there be " a Competition upon the Defunct Fiar's Debts, which will " be preferred to the apparent Heir's Executors Creditors; " but if there be no Debts of the laſt infeft or apparent Heir, " the Rents will remain in *hereditate jacente*, and will belong " to the next Heir without Confirmation."

This Paragraph clearly diſcovers the Author's Opinion to have been, that though the apparent Heir has a poſſeſſory Title to the Fruits and Rents from the Predeceſſor's Death, ſo as that he may uplift the ſame, or they may be affected for his Debts, yet the Rents, that are unuplifted at his Death, will, if he has no Debts, remain in *hereditate jacente*, to be taken up by the next Heir. His Words are expreſs upon this Point, *viz.* " But if there be no Debts of the laſt infeft or apparent " Heir, the Rents will remain *in hereditate jacente*, and will " belong to the next Heir, without Confirmation." And with theſe Words he ſums up his Opinion in this Paragraph, than which there cannot be a more direct Authority for the Informant's Plea, that as Miſs *Hamilton* left no Debts, the Rents unuplifted by her muſt remain *in hereditate jacente*, and will belong to him as next Heir. And, by theſe Words of the Author, which are ſo clear and unambiguous, his Meaning in other Places muſt, by all the Rules of Interpretation, be explained. Thus, for Inſtance, where he ſays, juſt a few Lines before, in the ſame Paſſage, that the Rents will belong to the apparent Heir's Executors, he plainly means Executors Creditors; that is, the Rents may be made effectual for Payment of the apparent Heir's Debts. And he calls them Executors Creditors in a few Lines after. It is ſubmitted therefore, that,

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in fair Conſtruction, this Author's Opinion muſt ſtand for the Informant.

The other Paſſages founded on by our Party is, that in P. 168, where he ſays, " That if the apparent Heir die uninfeft, " his neareſt of Kin will have Right to the Rents reſting " from his Predeceſſor's Death to his own Death, and theſe " will be ſubject to his own proper Debts, *&c.*" And again, P. 453, in theſe Words, " Yea the Rents of Lands were ſo " far found to belong to an apparent Heir, that, though he " died unentered, the next Heir not entering to him, was " found obliged to pay the former apparent Heir's Aliment, " in ſo far as they intromitted with the Rents of the Years, " during which the former apparent Heir lived, *December* 20th " 1662, Lady *Tarſappie* contra *Tarſappie*; and conſequently " the Rents might be confirmed by his Executors, or arreſted " for his Debts."

In theſe Places it is obvious, that the Author is treating the Subject very looſely, not from Reaſon or the Principles of Law, but by Deduction or Inference from the Deciſion in Lady *Tarſappie*'s Caſe. The Rents unuplifted were in that Caſe ſubjected in Payment of the apparent Heir's Aliment. Thus far, and no farther, went the Deciſion, and thus far it evidently went, from Conſiderations of Equity, rather than the Principles of Law. But, as one Error is commonly the Mother of many, ſo Lord *Stair*, impreſſed with that Deciſion, has drawn Inferences from it which ought not to be admitted. His Argument is no better than this. The Court has found in one Caſe, that Rents unuplifted are liable for the apparent Heir's Aliment. *Ergo*, They may be liable for the apparent Heir's Debts, of any kind. *Ergo*, They may be taken by his neareſt of Kin. The Fallacy of this Reaſoning is too glaring to need a particular Detection. For neither of the Concluſions ought to follow from the Principles of Lady *Tarſappie*'s Caſe. Her Claim was favourable in the higheſt Degree, and a Stretch might be made to ſupport it; but from that

that Stretch to make another Stretch to all the apparent Heirs Creditors, and not even to reſt there, but to take ſtill a much wider Stride in favour of the neareſt of Kin, cannot be juſtified by the Rules either of Reaſon or Law. Theſe laſt Paſſages, where the Author ſpoke under the Authority of Lady *Tarſappie*'s Deciſion, cannot be put in the Balance, or ſet againſt his Opinion in his firſt Paſſage before mentioned, where he expreſsly ſays, that, where there are no Debts of the apparent Heir, the Rents unuplifted remain in *hereditate jacente*, and go to the next Heir.

But further, whatever this Author's Opinion might have been, when under the Influence of the new Deciſions of Lady *Tarſappie*, and the firſt Interlocutor in *Macbriar*'s Caſe, it can have little or no Weight with your Lordſhips at this Day, when it appears, from what is above ſtated, that not only on a Review of *Macbriar*'s Caſe, but in two other Caſes ſubſequent to it, the Court departed from theſe erroneous Notions, and returned to ſound Principles, by finding that Rents unuplifted remained in *hereditate*, and belonged to the next Heir. And that, upon theſe later Deciſions, the Law has reſted to this Day.

It was ſaid, that the Right of Property and the Right of Poſſeſſion were ſeveral diſtinct Rights, each of them having their own proper Effects; it was admitted that an apparent Heir had no Right of Property in the Eſtate, but that he had a Right of Poſſeſſion of the Rents and Profits of it. Let this be ſuppoſed in the Argument, and ſtill the Queſtion will remain, What the Extent of this Right of Poſſeſſion is? It has been allowed, that the apparent Heir's Right of Poſſeſſion goes ſo far as to protect the Eſtate againſt an Intruder, and to enjoy the Rents upon the voluntary Payment of the Tenants; nay, from Equity, though unuplifted, they have been ſubjected to his Aliment or to his Debts. But ſtill we muſt ſtop ſomewhere, leſt we convert the Right of Poſſeſſion into a Right of Property. And the proper Place to ſtop is, where the

the Poſſeſſion ends. For, as it is Poſſeſſion that gives the Right, that Right muſt end with the Poſſeſſion. And indeed, ſo far as occurs to us, we do not remember one Caſe, where the Right of Poſſeſſion has been extended beyond the Poſſeſſion itſelf. A *bona fide* Poſſeſſor, who ſtands in the moſt favourable Light, may preſerve his Poſſeſſion againſt Force or Fraud, and he may make the Fruits uplifted and conſumed his own. This is the natural Conſequence of his Poſſeſſion. But if he ſhould loſe the Poſſeſſion, or abſtain from it, his *bona fide* Right of Poſſeſſion would not entitle him to claim the Rents which he had not poſſeſſed. As his Right depended upon Poſſeſſion, it muſt fall by the Loſs of it. This is quite agreeable to Lord *Stair*'s Opinion of the Matter. He ſays, P. 168, "To come to the Right employed in Poſſeſſion, it "is mainly in two Points, *firſt*, In the Right to continue it "againſt all illegal contrary Acts. 2*dly*, In a Right of the "Appropriation of the Fruits conſumed *bona fide*, both theſe "are introduced by poſitive Law for Utility's Sake." And a little after, "Like unto this is the Right of apparent Heirs to "poſſeſs their Predeceſſor's Rents, though they be not infeft, "*&c.*" Whence we may fairly conclude, that as the Right of Poſſeſſion terminates with the Poſſeſſion itſelf, ſo the Right of Poſſeſſion given to an apparent Heir terminates with his Poſſeſſion. So much of the Rents as he has uplifted and poſſeſſed, he has made his own by his Right of Poſſeſſion. But what he has not poſſeſſed cannot pertain to him by that Right. The Rents unuplifted muſt remain as Part of the Inheritance, to be taken up by the next Heir.

It was ſaid, that this Right of Poſſeſſion was ſo inherent in the apparent Heir, that it devolved to him *ipſo jure*, without his Knowledge or Conſent, as in the Caſe of an Infant, or abſent Heir. This is altogether inconceivable. For at that Rate every Heir behoved neceſſarily to incur the univerſal paſſive Title of *geſtio pro herede*. There is certainly no implied Right of Poſſeſſion in the Heir, that can have any Effect, un-

leſs he apprehends the Poſſeſſion. The Right of Poſſeſſion, as it muſt end, ſo it muſt begin by the Poſſeſſion. No body doubts, that an Infant, or abſent Heir, may apprehend the Poſſeſſion by his Tutor or his Factor; but there is no Neceſſity for their ſo doing, they may abſtain from it if they pleaſe.

An Argument was drawn from the Act 1695, that as an apparent Heir, three Years in Poſſeſſion, can contract Debt to the Value of the Eſtate, which may affect the Eſtate, it would appear odd, that the Rents unuplifted at his Death ſhould not belong to his Executors. But this is nothing to the Purpoſe, as it proceeds upon a Miſapprehenſion of the Statute; for the Statute does not give any Right in the Eſtate, to an apparent Heir three Years in Poſſeſſion. If he was twenty Years in Poſſeſſion, the Eſtate would not belong to him, nor deſcend to his Heirs; neither, upon that Footing, ought the Rents unuplifted to belong to his Executors. There is no new Right given to the apparent Heir by that correctory Statute. The next Heir entering, indeed, is made *paſſive*, liable for his onerous Debts and Deeds; but the Heir's legal Right in the Eſtate was not thereby increaſed.

Mention will probably be made, of the late Deciſion in the 1755, betwixt the Executors of Sir *John Houſton*, claiming the Annualrents of a Bond, deſtined to be tailzied by Lady *Houſton*, which were unuplifted at the Time of Sir *John Houſton*'s Death, and the Heir of Tailzie in the Bond: But your Lordſhips will well remember, that the Executor was there preferred, not upon the general Point of Law here argued, but upon the Specialties which occurred in that very particular Caſe. Lady *Schaw* ſettled her Eſtate of *Carnock*, by a ſtrict Entail, upon Lady *Houſton*, her Daughter, and certain other Heirs. Of the ſame Date, ſhe aſſigned certain Annuities to her Daughter, and took an Obligation from her, that theſe Annuities, when recovered, ſhould be employed upon Lands, or good Security, to the ſame Heirs, and under the ſame Proviſions, as the Eſtate of *Carnock*. Lady *Houſton* diſponed

poned the Eſtate of *Carnock* to her Son, Sir *John*, in his Contract of Marriage, and died without having ſecured the Annuities, in terms of her Obligation. Upon her Death, Sir *John*, as Heir of Tailzie in the Eſtate of *Carnock*, came to be Creditor, in her Obligation to ſecure the Annuities. The Intereſt of theſe Annuities, ariſing before Sir *John*'s Death, were claimed by *Houſton* of *Johnſton*, as Sir *John*'s Executor, as having been *in bonis* of Sir *John*, not only as apparent Heir, in Lady *Houſton*'s Obligation, but alſo, for that he was directly Creditor in the Obligation, and had Right to theſe Annualrents, *pleno jure*, he having been infeft and ſeaſed in the Eſtate of *Carnock*; and though both Points were argued, it is informed, the Deciſion proceeded upon a complex View of the Caſe, without any particular Judgment having been given upon the different Arguments, urged in ſupport of the Executor's Right: From which it is clear, that this Deciſion can be of no Authority in the preſent Queſtion.

The Executrix was pleaſed to ſtate a Sort of perſonal Objection againſt the Informant, alledging, that as by his quarrelling Miſs *Hamilton*'s Right to the Eſtate, ſhe had been prevented from making up her Titles, he ought to reap no Benefit from her having died in Apparency. The Importance of this curious Defence is ſubmitted without Argument, no Brieve being ever taken out by Miſs *Hamilton*, for procuring herſelf ſerved Heir, and compleating her Right to the Eſtate. The Informant did not act in that Matter, with any View to what has now happened: He was aſſerting a Right, which he was adviſed had devolved upon himſelf and his Family: Theſe accidental Diſputes can have no Influence upon the Point of Law, which is here ſubjected to your Lordſhips Deciſion, free and unincumbered with any extraneous Circumſtances.

In reſpect whereof, &c.

AND. PRINGLE.